Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-833

JOSEPH GOLDMAN,
Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S REPLY MEMORANDUM

NATHAN LEWIN
JAMIE S. GORELICK
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W. Suite 500
Washington, D.C. 20037

Attorneys for Petitioner

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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1. The Solicitor General argues that it was not error to present to the jury evidence that the petitioner was silent in response to some questions asked in a post-arrest interrogation because petitioner waived his Fifth Amendment rights by signing the FBI's "waiver-of-rights" form.[1] This response (Br. in Opp. 4-5) overlooks the fact that such a form is signed at the *outset* of an interrogation, and that the right asserted here — the right to remain silent "at any time prior to *or during questioning*" (*Miranda v. Arizona*, 384 U.S. 436, 473 (1966)) — may be asserted "in any manner." *Ibid.* By its very nature, the right to *stop* answering questions must come after a period of time when a suspect *does* answer questions. To say, as the Solicitor General now does, that a suspect who begins answering will be presumed to have stopped because of a "strategic choice" is to eliminate altogether the constitutional right — recognized in *Miranda* — "to cut off questioning." 384 U.S. at 474. What precise words should the petitioner have used in answer to the FBI agent's continued questions if he wanted to exercise his right to "cut off" questions rather than making the "strategic choice" that the Solicitor General now asserts that he made? We submit that the course petitioner took is precisely what the Constitution and *Miranda* protect — he remained silent when asked another question. And that silence has now been used against him.

[1] Even the Court below had some doubt whether the form really gave a suspect a meaningful opportunity *not* to waive his rights. It said: "The FBI might well give thought to restructuring its form to avoid this kind of objection." Pet. App. 4a, n.3.

2. The prosecutor's appeal to religious prejudice in his summation is deplored by the Solicitor General (Br. in Opp., p. 6) — as well it must be. The Solicitor General argues, however, that the appeal to passion was cured by the judge's instructions. In fact, however, the instruction was not made "immediately following" the remark. Defense counsel objected when the statement was made, and the judge then instructed the jury on a totally different matter. Thereafter, the prosecutor was permitted to conclude his argument. Only after the argument was finished and defense counsel raised the issue again and moved for a mistrial did the judge take any action. At that point — much too belatedly, we submit — the judge gave a moderate instruction which did not criticize the prosecutor in any manner. (We have reproduced the relevant portions of the transcript as an Appendix to this Memorandum.)

An even more fundamental error that pervades the Solicitor General's response to this argument is the suggestion that a judge's neutral instruction can cure an improper appeal to religious bias of the kind made here. A

judicial instruction may effectively eliminate from the jury's consideration an element of proof that appeals to the jurors' sense of reason; it is not likely to be effective when the remark which jurors hear is one that plays on their emotions. Words cannot make our point as well as it is illustrated in the drawing on the following page, taken from *The New Yorker* of October 3, 1977.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
JAMIE S. GORELICK

MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

Attorneys for Petitioner

"The jury will disregard the witness's last remarks."

APPENDIX

MR. DIMITRI: He sits before you with what they call in the Jewish religion a yamaka. I think I asked you when you were selected to appear on this jury whether you would be prejudiced one way or the other because the defendant appeared to be of the Jewish faith. I would hope certainly that wouldn't be true under any circumstances. Why do I mention this? Why do I mention that — because based upon the facts of this case that religious symbol that this man wears has been defamed, defiled and scandalized.

MR. DeCELLES: Objection.

THE COURT: Just a moment. There are two things I must tell you, members of the jury. The prosecutor said that the defendant chose to say nothing. Now, there is an absolute right in argument to a jury to review the evidence as the person arguing recalls that evidence. That's perfectly permissible. I told you in my instructions, however, that you and you alone must decide what the facts are and what the defendant's counsel or the prosecutor tells you is not evidence. You must always bear in mind, however, that the defendant has a right to remain silent. You should never erase from your minds that in a criminal case there is no burden whatsoever on the defendant to prove or disprove anything. The entire burden is always on the Government. Now, I felt I had to tell you that and as far as this point is concerned I would suggest that we carry on in a different vein at this time.

MR. DIMITRI: Yes, Your Honor. By the way, I don't want to give you the wrong impression. I certainly subscribe to the fact any defendant has a right to remain silent, there's no question about that, that's his constitutional right. I'm asking you, look at the evidence in the context of the statement given to the FBI agent in November of 1975. That's all I'm asking you to do. And again, to get back to the common sense approach, ladies and gentlemen of the

jury, this is a common sense case. Look at it simply this way: July of 1975 no question this defendant goes into the Citizens Savings Bank, Providence. Any question about that — none. His picture is right there — opens up an account. He admitted that to the agent in his statement. In August of 1975 he goes to Rock Island, Quebec. Any question about that? Mrs. Joyal was positive of his identification. Checks were found in his possession. An $8,000 check travels from Rhode Island to Quebec. Any question about that — look at it, read it when you get up to your jury room. It will tell you right on the check. Use your common sense in making a decision in this case. That's all I ask you to do and I'm quite sure that your verdict will be a proper one. Thank you very much.

MR. DeCELLES: Your Honor.

(Colloquy at side bar between Court and counsel)

MR. DeCELLES: I move for a mistrial based on Mr. Dimitri's reference to my client's silence. I don't think this can be cured by curative instructions. It would so taint this jury that a mistrial is in order.

THE COURT: On that ground your motion is denied.

MR. DeCELLES: I also make the same motion on the basis of the inflammatory remark about my client's religious attire.

THE COURT: I intend to instruct the jury on that point. Your motion is denied.

(Conclusion of side bar colloquy)

THE COURT: Just a couple of comments, members of the jury, before we come to the argument by defendant's counsel. In your consideration of this case in your jury room you look to the facts, members of the jury, as you find the facts, as you find the facts from the evidence in this case and you do so without passion, without prejudice, objectively. A man's religion or a man's attire has no bearing

to the case. It must not enter into your deliberations. All right, Mr. DeCelles.

(Whereupon Mr. Decelles presented closing summation to the jury on behalf of the defendant commencing at 10:37 a.m. and concluding at 10:55 a.m.)